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October 22, 2012

Submitted Via Email: commentletters@waterboards.ca.gov
Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

RE: Airlines for America Comments on the California Water Resources Control Board's *2012 Draft National Pollutant Discharge Elimination System (NPDES) General Permit for the Discharge of Storm Water Associated with Industrial Activities*

To Whom It May Concern:

Airlines for America ("A4A") appreciates this opportunity to comment on the California State Water Resources Control Board ("Board") proposed 2012 Draft National Pollutant Discharge Elimination System (NPDES) General Permit for the Discharge of Storm Water Associated with Industrial Activities ("Draft IGP").

A4A is the principal trade and service organization of the U.S. airline industry.[1] Its member airlines and their affiliates transport more than 90 percent of all U.S. airline passenger and cargo traffic. As such, A4A frequently comments on regulatory activities that affect the airline industry and air travel in the United States. A4A and its airline members take environmental protection seriously and, as set out in more detail below, have a strong record of advancing environmental. While sharing the Board's interest in furthering such goals, A4A nonetheless has serious concerns regarding the Draft IGP. Accordingly, as detailed below, we respectfully request that the Board:

- Include no Numeric Effluent Limits (NELs) in the final permit
- Eliminate Numeric Action Levels (NALs)
    - Because they effectively function as NELs and there is no basis for establishing these values as benchmark numbers

[1] The members of A4A are: Alaska Airlines, Inc., American Airlines, Inc., Atlas Air, Inc., Delta Air Lines, Inc., Federal Express Corporation, Hawaiian Airlines, JetBlue Airways Corp., Southwest Airlines Co., United Airlines, Inc., United Parcel Service Co., and US Airways, Inc. Air Canada is an associate member.

- Clarify that NALs cannot be used as a benchmark of the adequacy of BMPs to satisfy BAT/BCT technology standards

- Modify Monitoring Provisions for the Air Transportation Industry

    - Eliminate monitoring obligations for the industry
    - Reinstate group monitoring for the industry

- Prohibit the use of compliance groups for the Air Transportation Industry
- Clarify prohibition of non-stormwater discharges
- Replace the reference to proposed ELG for airport deicing discharges with a reference to the final, promulgated ELG
- Clarify training qualifications for Qualified Industrial Storm Water Practitioner (QISP) Level I, II and III to include a "train the trainer" program
- Review and correct or explain NOI deadlines

I. Industry Overview

The air transportation industry has a decades-long record of lowering environmental impacts even as it drives increasing levels of economic activity and growth.

It is difficult to overstate the importance of commercial aviation to the Californian economy and the nation as a whole. The FAA reports that aviation is ultimately responsible for 4.9 to 5.2 percent of U.S. gross domestic product ("GDP") and helps generate $1.2 to $1.3 trillion in annual economic activity, $370 to $405 billion in annual personal earnings and 9.7 to 10.5 million jobs.[2] Aviation is even more important to the California economy:

- In 2009, aviation drove 4.8% of California's GDP and accounted for about 1.1 million jobs, about 5.5% of total employment in the state.[3]
- "[In 2008, a]cross all states, a total value of $562.1 billion in goods was transported by air. California ranked highest with $101.4 billion [or, 18% of the national total]."[4]
- "[In 2008, t]he value of domestic air freight from California accounts for about one-fifth of the value all domestic shipments, or $39 billion."[5]

[2] FAA, *The Economic Impact of Civil Aviation on the U.S. Economy* (August 2011), *available at:* http://www.faa.gov/air_traffic/publications/media/FAA_Economic_Impact_Rpt_2011.pdf.

[3] *Id.* at p. 8.

[4] *Id.* at p. 40.

[5] *Id.*

- According to U.S. Department of Commerce, nearly half of all exports from California are shipped by air. Together, California imports and exports shipped by air were valued at over $160 billion in 2011 (about $440 million per day).[6]

The industry's contribution to the economy is matched by its commitment to and achievement of environmental protection. For example, at the national level, between 1978 and 2011, U.S. airlines improved fuel efficiency by 120 percent, which has resulted in 3.3 billion metric tons of carbon dioxide (CO2) savings. In California, from 1990 through 2009 greenhouse gas emissions from combustion of jet fuel in the commercial aviation sector have decreased 7.6% (inclusive of international, interstate and intrastate emissions),[7] while the air transportation services provided by the sector has increased 80%.[8]

Our achievement has largely been the result of a relentless commitment to innovation and efficiency improvement, a commitment which extends to the stormwater arena. For example, airlines led the successful effort to incorporate environmental criteria into the certification standard for Type I aircraft deicing fluids which ensured aircraft deicing fluid ("ADF") manufacturers would eliminate the use of certain substances and reduce the toxicity of these fluids to extremely low levels. In addition, there are new fluids entering the market with much lower oxygen demand profiles and new ice-phobic coating technologies are being tested and developed that hold the potential for allowing drastic reductions in aircraft deicing fluid usage in the future. At the same time, however, the industry has made huge investments in programs and infrastructure to manage and treat stormwater.

In addition, airlines and airports work together under a range of regulatory programs designed to encourage pollution prevention and preserve water quality. All airport NPDES permits, including the existing 1997 industrial stormwater permit, require

[6] Percentages are based on value of shipments. *See* U.S. Dept. of Commerce, International Trade Administration State Import Data (http://tse.export.gov/stateimports/TSIREports.aspx?DATA=) and State Export Data (http://tse.export.gov/TSE/TSEReports.aspx?DATA=SED).

[7] Determined from values reported for CH4, CO2 and N2O emissions from "Aviation: Domestic Air Transport: Intrastate – Jet Fuel", "Aviation: Domestic Air Transport: Interstate – Jet Fuel", and "Aviation: International Civil Aviation: Jet Fuel" in *California 1990 Greenhouse Gas Emissions Level and 2020 Limit* (available: http://www.arb.ca.gov/cc/inventory/1990level/1990level.htm) and *Greenhouse Gas Inventory Data – 2000 to 2009* (available: http://www.arb.ca.gov/cc/inventory/data/data.htm).

[8]

Round-Trip Revenue Passenger Miles (RPMs) and Revenue Ton Miles (RTMs) from California

	1990	2009	H/(L)	%H/(L)
RPMs (All Passenger)	164,790,909,817	262,325,850,722	97,534,940,905	59.2%
RTMs (All Cargo)	1,162,016,217	5,565,223,100	4,403,206,883	378.9%
Total Revenue Ton Miles*	17,641,107,198	31,797,808,172	14,156,700,974	80.2%

*Assumes 200 lbs per passenger; Source: US DOT T-100 Data (available: http://www.bts.gov/)

compliance with the Clean Water Act's technology- and water quality-based standards. As a part of their compliance with those permits, airports and airlines cooperate in developing and implementing stormwater pollution prevention plan (SWPPPs).

A closely related program is the Clean Water Act's oil spill program, under which airports and their tenants develop integrated Spill Prevention Control and Countermeasures (SPCC) plans that comprehensively evaluate potential threats to water from releases of oil and define the structural and operational methods necessary to prevent spills and to address any threatened release of oil to the environment. These programs work in tandem, with the SPCC regulations requiring that aboveground storage tanks be protected by appropriately sized secondary containment to contain the contents of the tank in the event of a leak and NPDES-driven SWPPPs ensuring, either through visual observation or documented checklists, that the secondary containment is kept emptied after storm events to ensure the containment capacity is maintained should there be a tank failure.

Additionally, management of stormwater is subject to stringent Federal Aviation Administration (FAA) requirements designed to ensure safety, maintenance of operations, as well as consider impacts to water. For example, Advisory Circular (AC) 150/5320-5C, *Surface Drainage Design*, "provides comprehensive and practical guidance to . . . for the design of storm drainage systems associated with transportation facilities." AC 150/5300-15A, ¶210 emphasizes that "[s]torm runoff must be effectively removed to avoid interruption of operations during or following storms and to prevent temporary or permanent damage to pavement subgrades" and that this is "accomplished by a drainage system unique to each site." Similarly, AC 150/5200-33B, *Hazardous Wildlife Attractants on or Near Airports*, provides comprehensive guidance to ensure airport facilities, including stormwater treatment and management facilities, are designed to minimize threats to the safety of aircraft operations, particularly bird strikes. AC 150/5320-15A, *Management of Airport Industrial Waste*, speaks directly to stormwater management:

> provid[ing] basic information on the characteristics, management, and regulations of industrial wastes generated at airport and guidance for the development of a Storm Water Pollution Prevention Plan (SWPPP) that applies best management practices to eliminate, prevent, or reduce pollutants in storm water runoff associated with particular airport industrial activities.

This is reinforced by AC 150/5300-15A, *Airport Design*, which addresses "drainage considerations" in ¶210, by emphasizing the need to design stormwater management systems to ensure runoff is removed to avoid interruption of aircraft operations and to "[e]mploy best management practices (BMPs) to mitigate the adverse impacts of development activity," commenting "[r]egulatory control for water quality practices is driven by NPDES requirements under such programs as the Clean Water Act and state and local requirements." ¶509, addresses drainage in apron areas, providing "[s]ince there can be fuel and oil spills on aprons oil water separators and other appropriate treatment systems should be incorporated into the drainage systems."

In addition, pursuant to the National Environmental Policy Act (NEPA), airports and their tenants are required to conduct a comprehensive review of the potential impacts to water and develop appropriate management practices to address those impacts whenever developing a new master plan or implementing significant new construction or facility modifications. *See* Order 1050.1E, *CHG1*, *Policies and Procedures for Considering Environmental Impacts*, Order 5050.4, *NEPA Implementing Instructions for Airport Projects*.

The Regional Boards must be instructed that when reviewing technical reports demonstrating that BAT/BCT-level technology is being applied at an airport they must recognize such legally binding limitations on technology selection and will honor prior findings by the state and regional boards and by other cognizant agencies with respect to the sufficiency of systems to meet BAT/BCT, the sufficiency of systems to support attainment of water quality standards, and of similar relevant conditions.

Several factors distinguish this industry from others and it is critical to consider these factors when assessing the structure and impacts of the Draft IGP.

- ***Safety is an Overriding Imperative***
  Consistent with Congressional policy, ensuring the safety of passengers, crew and the public is and always must be the overriding imperative for the air transportation industry.[9] Many activities that may be associated with stormwater impacts are required to ensure public safety and already subject to stringent regulation by the FAA. Aircraft and airfield pavement deicing are examples. The complexities inherent in fulfilling this safety imperative, led by the FAA, distinguish our industry from other industries to which this General Permit applies. As a result, the derivation of uniform standards is not possible.

- ***Air Transportation is a National Priority***
  At the same time, air transportation is a service that Congress has determined to be of national importance and federal policy requires that the National Airspace System ("NAS") operate so as to accommodate demand for air transportation services to the maximum extent possible.[10]

[9] *See* 49 U.S.C. § 47101(a)(1) ("safe operation of the airport and airway system is the highest aviation priority").

[10] *See generally*, 49 U.S.C. § 47101. As with all states, California's authority to regulate the air transportation industry is constrained by Federal aviation laws, including the Federal Aviation Act of 1958 and the Airline Deregulation Act. Courts have consistently held the Federal Aviation Act of 1958 creates a "uniform and exclusive system of federal regulation" of aircraft that preempts state and local regulation. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973); *see also American Airlines v. Department of Transp*., 202 F.3d 788, 801 (5th Cir. 2000) (aviation regulation is an area where "[f]ederal control is intensive and exclusive") (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 3030 (1944)). This pervasive federal regulatory scheme extends not only to aircraft in flight, but also to aircraft-related operations on the ground. In addition, the Airline Deregulation Act precludes states from

- ***Management of Stormwater at Airports is Recognized by EPA to be Inherently Site-Specific***

  Management of stormwater associated with commercial aviation activity is dictated by a multitude of complex factors and these factors vary widely across airports. These factors include safety of flight, including departure operations, and the safe ground operation of aircraft. Operational safety cannot be assumed but must be actively ensured, separately and uniquely, at each individual airport. Moreover, airports and airline operations present a highly variable mix of operations and fleets. These variations also affect the technologies available at individual airports to manage the runoff of stormwater containing aircraft deicing fluid. Other factors include variable geology and hydrology that affect the ability and the cost of potentially available control technologies, existing infrastructure configurations that determine design and system performance, and of course variable climates that dictate the amount and timing of ADF usage, as well as its collectability.

  EPA recognized and documented the inherently site-specific nature of the air transportation industry in its final Effluent Limitation Guidelines and New Source Performance Standards for the Airport Deicing Category, 77 Fed. Reg. at 29168 (May 16, 2012); codified at 40 C.F.R. Parts 9 and 449 (2012). Specifically, the Agency made the following specific finding.[11]

  > EPA has determined that none of the ADF collection technologies considered for today's final rule represents the best available technology for the entire category. Rather, EPA concludes that best available technology determinations ***should continue to be made on a site-specific basis because such determinations appropriately consider localized operational constraints (e.g., traffic patterns), land availability, safety considerations, and potential impacts to flight schedules***.
  >
  > Based on the information in its record, EPA cannot identify with precision the extent to which such limitations may preclude, at any particular airport, the use of the technologies that it considered for BAT control of aircraft deicing discharges for today's final rule.
  >
  > However, the record demonstrates that such limitations exist and are not isolated or insignificant. In light of this finding, ***EPA decided that it should not establish national ADF collection (and associated discharge requirements) based on any one or more of the ADF collection technologies as the presumptive BAT-level control technology. Rather, site-specific proceedings are the appropriate forum***

"enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route or service." 49 U.S.C. § 41713(b)(1).

[11] 77 Fed. Reg. at 29178, cols. 1 and 2 (emphasis added).

for weighing all relevant considerations in establishing aircraft deicing discharge controls.

- ***Airports Are Very Large Facilities, Typically Owned and Operated by Quasi-Governmental Entities***
  In addition, the size and cost of the collection and treatment systems that must be utilized by airports also distinguishes this industry from other industries. Unlike wastewater collection in a steel mill, for example, which is accomplished by a length of pipe, collection of deicing runoff occurs on a scale similar to and by means consistent with those of municipal wastewater collection systems. As is the case with municipal systems, airport infrastructure representing millions of dollars of sunk costs tracks, or must be made to track, through a larger, complex built environment representing a billion or more dollars at each airport. As noted above, each of these systems is unique and performs differently. Also like municipal systems, large airport infrastructure projects take years to design, require investments of tens or hundreds of millions of dollars, and must be implemented in a manner that ensures vital public service is not interrupted. Thus, the sheer size, complexity and cost of airport collection and treatment systems render them qualitatively different than systems in other industries that would be covered by the Draft IGP.

II. Structural Issues

A4A has an overarching objection to the structure of the Draft IGP because it seeks to transfer the responsibility and burden of developing technology-based standards from the Board to the holders of the permit. This objection has both legal and policy components, each of which we describe below.

A. Draft IGP Fails to Implement 33 U.S.C. 1342(a)(1)

The Board is candid about its approach in this permit. The Fact Sheet states that "[i]t is infeasible for the State Water Board to develop numeric Technology Based Effluent Limitations (TBELs) for discharges covered by this General Permit at this time. The State Water Board does not have the information and resources needed to develop them using the BPJ approach."[12] In lieu of numeric technology-based effluent limitations, the Draft IGP relies upon the authority granted in U.S. EPA's NPDES regulations to impose technology-based limitations in the form of Best Management Practices.[13] To this point, the Board's approach is appropriate.

It is at the next step that the draft permit goes awry. The Draft IGP states that "[d]ischargers shall implement BMPs that constitute BAT/BCT to prevent and reduce

[12] Draft Fact Sheet at 20.
[13] Draft Fact Sheet at 21. *See* 40 C.F.R. 122.44(k)(3) and (4).

pollutant discharges."[14] Other than the Minimum BMPs required of dischargers of all types, which clearly are understood to constitute only a starting point in developing adequate Best Management Practices, the permit provides no findings by the Board or guidance to discharges as to what constitutes BAT/BCT-level control. The additional "Facility-Specific BMPs" required under the Draft IGP -- presumably the measures that will bring facilities up to full BAT/BCT performance -- simply is an injunction to dischargers to "identify and implement additional facility-specific BMPs necessary to minimize to prevent pollutants in industrial storm water discharges to achieve compliance with BAT/BCT and WQS."[15] Beyond that injunction, which itself is a paraphrase of the BAT and BCT standards of performance articulated by the Clean Water Act, there is no determination by the Board or guidance on the level of further BMP application required to meet the statutory standard. The Draft Fact Sheet characterizes this as a "narrative technology-based standard for BMP implementation in accordance with BAT and BCT for their industry."[16]

It is this "narrative" Best Professional Judgment standard that is inconsistent with the terms of the Clean Water Act.

The statute is clear in its mandate to permit writers. Section 402(a)(1) authorizes the issuance of permits on the following terms:

> "Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act."[17]

Based on the Board's own statements it has not been able to take the necessary implementing actions related to sections 301, 302, 306, 307, 308, and 403 of the Act. As a result, permit issuance here must be authorized under Section 402(a)(1)(B). Such issuance is authorized only if the permit reflects a determination by the Board, pursuant to its delegation from the Administrator, of those conditions necessary to carry out the enumerated provisions of the Act. By merely reiterating the language of the enumerated statutory sections, the Draft IGP fails to identify "such conditions"[18] and, more tellingly,

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[14] Draft IGP, Section V(A) at 21.
[15] Draft IGP, Section X(H)(4).
[16] Draft Fact Sheet at 21.
[17] 33 U.S.C. 1342(a)(1).
[18] EPA's NPDES regulation echoes this obligation, stating that permits must include "[t]echnology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CW A, or new source performance standards promulgated under section

reveals that the Board has not made the determination necessary to authorize issuance of an NPDES permit under the statute. Put simply, restatement of the law is not the same as a determination of the permit conditions necessary to carry out the law. In the absence of the latter, the Draft IGP is not legally viable.[19]

B. Transfer to Permittees of Burdens and Risk of Standard is Unwarranted

The Board also is clear in its intention to use data gathering under the Draft IGP so that it may promulgate NELs "in future general permits (or through a set of industry specific permits)."[20] Because the Board represents that it does not have the resources or information to promulgate NELs at this time, it is requiring permittees to expend those resources to develop the information the Board needs. This broad process includes:

a. Requiring permittees to hire QISPs so that they can do the work state officials should be doing; and

b. Requiring permittees to conduct extensive, expensive analyses (ERA Technical Reports).

At a minimum, this is bad public policy. When governments do not manage their resources properly they cannot outsource work they have been charged with doing. That, however, is precisely what this permit does, by mandating hiring employees and expenditure of financial and human resources. Moreover, where governments cannot afford to carry out their programs it is incumbent upon them to take responsibility for this. Outsourcing through mandates on private industry amounts to hidden taxation divorced from the political process that is supposed to govern both determination of government responsibilities and imposition of taxes necessary to meet those responsibilities.

As currently structured, the Draft IGP constitutes an abdication of the State's responsibility to develop permit terms and to perform regulatory acts mandated by state and federal law. Before proceeding it is incumbent upon the Board to reconsider its approach and, we believe, recalibrate the balance it is establishing between the state government and its citizens.

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306 of CWA, on case-by-case effluent limitations determined under section 402(a)(I) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter. . . .." *See* 40 C.F.R. 122.44(a)(1).

[19] By shifting the obligation to identify and justify their selection of BAT/BCT-level control, the Draft IGP also shifts the risk of properly establishing BAT/BCT-level control from the Permitting Authority to the individual permittees, and removes both the public participation and appeal rights that the statute provides to protect permittees' rights.

[20] Draft Fact Sheet at 8.

C. Permit Obligations Designed to Facilitate Development of Industry-Specific Effluent Limitations Are Inappropriate for Air Transportation Industry

In any event the approach set out in the Draft IGP is unworkable for our industry. A truism in our industry is: "If you have seen one airport, you have seen one airport." The air transportation industry simply is not compatible with uniform, one–size-fits-all effluent limitations. As noted above, EPA spent a decade and millions of dollars trying to formulate nationwide effluent limits for deicing operations and, in the end, acknowledged that this was not a practical approach.

While the selection of airports and airline operations in California is smaller than the national system, it is no less diverse. It is no less appropriate for the Board to seek to develop industry-wide effluent limitations for airports in California than it was for EPA to seek to develop a uniform standard for airports nationwide. All provisions in the Draft IGP that have as their rationale support of such an effort, therefore, are unsupportable and must be eliminated in the final IGP.

III. Specific Issues

A. Elimination of Numeric Effluent Limits (NELs)

We support elimination of NELs as an appropriate recognition that promulgation at this time is infeasible. Promulgation of supportable NELs would require the exercise of Best Professional Judgment ("BPJ") by the permit writer (i.e., the Board). The Board appropriately recognizes that it lacks sufficient data to exercise BPJ in a manner that supports adoption of numeric NELs.[21] It bears emphasis, however, that the USEPA has expressly found that ". . . best available technology determinations should continue to be made on a site-specific basis."[22] It simply is not possible to develop numeric technology-based effluent limits for the air transportation industry; certainly it is not possible to do so in the context of a general permit applicable to all industrial sources.

B. Numeric Action Levels (NALs) Should be Eliminated

While the Draft IGP properly abandons NELs, it adopts the use of NALs. NALs also must be eliminated from the final IGP because they (a) are the functional equivalents of numeric effluent limitations and (b) bear no rational relationship to a discharger's employment of BMPs representing BAT/BCT-level control.

1. NALs are the Functional Equivalent of NELs

[21] Fact Sheet at 7-8.
[22] 77 Fed. Reg. at 29178, cols. 1 and 2.

Despite the Board's effort to differentiate NALs from effluent limitations they are, as described in this permit, functionally identical. Indeed, the Fact Sheet clearly states the Draft IGP's intentions:

> Accordingly, this General Permit establishes specific minimum BMPs as well as NALs in order to meet these minimum federal standards. In addition, this General Permit requires SWPPPs to be developed and additional site-specific BMPs to be implemented. By requiring Dischargers to implement these specific BMPs ***and meet NALs***, this General Permit ensures that Dischargers do not write their own permits.[23]

Taking the Fact Sheet at its word, the Draft IGP would mandate compliance with the NAL values. While that compliance might be achieved over time, and following one or more cycles of Exceedance Response Actions ("ERA"s), it is *compliance* with the NALs upon which the Draft IGP's rationale rests. If a permit mandates compliance with a numeric effluent value, even deferred compliance, that value can only be described as an effluent limitation. In short, NALs must be removed from the final IGP because they must constitute effluent limitations to support the Board's legal rationale for this permit.

In addition, the Board attempts to distinguish NALs and NELs by stating that unlike NEL exceedances, "NAL exceedances . . . are not, in and of themselves, violations of this General Permit".[24] However, under the Draft IGP, exceedances of NALs trigger mandatory ERAs which, if they are not taken, do constitute violations of the permit: "A Discharger that does not fully comply with the Level 1 and Level 2 ERA requirements, when required, is in violation of this General Permit."[25] While we understand the distinction between violation of a numeric limit per se and violation of a requirement to respond to an exceedance of the limit, in this case it is a distinction without a difference because the required response does not differ in substance from that the state would require in an enforcement action brought if there were an NEL exceedance. In a similar vein, Board acceptance of the SWPPP constitutes a determination that the SWPPP constitutes BAT/BCT, a question that may not be reopened based on "exceedances" of NALs which the Board explicitly affirms "are not derived directly from . . . BAT/BCT requirements."[26]

[23] Fact Sheet at 9 (emphasis added).
[24] Draft Order, ¶66.
[25] Draft Order, ¶66.
[26] Draft Order, ¶66. Moreover, the Board makes clear that one purpose of the NALs is to ensure "the public maintains a meaningful opportunity to participate in the permitting process." Fact Sheet at 9. The CWA, however, clearly provides that permit may only be issued after a hearing has been held, not before some undefined point in the future at which a hearing may be requested and held. CWA §402(a)(1) ("[T]he Administrator may, ***after*** opportunity for public hearing, issue a permit for the discharge of any pollutant . . .") (emphasis added).

As such, the NALs contained in the Draft IGP must be removed from any final permit unless the Board has overcome its stated inability to develop legally supportable numeric effluent limitations at this time.[27]

2. Values Selected for NALs Bear No Rational Relationship to BAT/BCT Standard

The NALs as stated also are flawed because they bear no rational relationship to the action triggered by their exceedance. Under the permit, exceedances of NALs trigger ERAs. At base, these ERAs are evaluations designed either to identify additional source controls necessary to reach BAT/BCT levels of performance (a Level 1 ERA), or to identify structural or treatment control BMPs necessary to perform the same function.[28]

It is not clear from the Fact Sheet whether NALs are intended to detect and correct discharges that fail to meet the technology-based BAT/BCT standard or whether they are intended to identify discharges with the potential to cause or contribute to a violation of water quality standards. Regardless, the NAL values selected here are arbitrary and capricious in either case.

To the extent that NALs are intended to serve as sentinels that warn of potential water quality violations, they are flawed because their exceedance triggers a review unrelated to the attainment of water quality standards. Under the Draft IGP, exceedance of NALs triggers a review of the sufficiency of a facility's BMPs as BAT/BCT controls. However, exceedance of a water quality sentinel value has no rational relationship to a review of controls for compliance with technology-based standards. Indeed, the fundamental difference between technology-based and water quality-based controls is that the first establishes a standard of performance based on technological factors but independent of the needs of the receiving waters while the second establishes standards of performance designed to protect a specific water body but without consideration of the availability of technology required to meet those standards. Triggering a review of controls against a technology-based standard as a consequence of exceeding a value calculated to be an indicator of discharges that could endanger water quality is comparable to requiring a driver to check his engine for compliance with emissions requirements because he has exceeded the speed limit. There is no rational relationship between the trigger (water quality-based values) and the action triggered (reassessment of technology-based controls). In the absence of such a relationship, the selection and imposition of these NAL values as triggers for ERAs is arbitrary and capricious.

[27] Should staff attempt to resolve this issue by simply excising the highlighted reference from the final Fact Sheet the Board would be forced to abandon the argument that the permit imposes NALs as a substantive requirement and, thus, satisfies the public participation requirement elucidated in the case law cited by the Fact Sheet. The Board would be left with the imposition of the Minimum BMPs enumerated at Draft IGP Section X(H)(2) as the sole, publicly reviewed technology-based effluent limitations that could lawfully be imposed by the final IGP.

[28] Draft IGP at XII(C) and (D).

The NAL values fare no better if the rationale for their selection is the assurance that technology-based standards are being achieved. In order to be proper triggers for review of BMPs for the sufficiency as BAT/BCT controls an NAL would need to be rationally related to the numeric value reflective of BAT/BCT for each pollutant. As the Fact Sheet and the Draft IGP repeatedly state, however, that NALs contained in the Draft IGP are not equivalent to or indicative of BAT/BCT levels of control.[29]

Moreover, there is nothing in the sources from which the Draft IGP's NALs are drawn that could fill that gap in the record. EPA's Multi-Sector General Permit contains benchmark values from which the Draft IGP took its annual NALs. Neither that permit nor any of its supporting materials assert that the MSGP's benchmark values are indicative of performance against the standard of BAT/BCT applicable to individual industry sectors. The Draft IGP's instantaneous maximum NALs are described as having been "calculated based on California industrial storm water discharge monitoring data."[30] While this phrase is repeated several times in the Fact Sheet, neither that document nor any of the other information made available by the Board during this public comment period provides any more detailed information about the origin of these values. In the absence of a record demonstrating that the annual and instantaneous maximum NALs are related to the expected performance of BAT/BCT-level technologies, it is arbitrary and capricious to impose those values and to obligate dischargers to conduct reviews of their BMPs whenever a stated exceedance of those values occurs.

3. If NALs are Retained, the IGP Must Explicitly and Unambiguously Provide that they are Not to be Considered When Determining the Whether BMPs are Sufficient to Satisfy the BAT/BCT Treatment Standards

Should NALs be retained in the final IGP the permit must contain language unambiguously stating that NAL values bear no relationship to BAT/BCT-levels of control and that an NAL is not to be considered when determining whether a discharger's BMPs are sufficient to satisfy the BAT/BCT treatment standard. The Draft Permit and the Fact Sheet repeatedly state that the NALs do not constitute NELs and that exceedance of an NAL does not constitute a violation of the permit. These admonitions are both wise and necessary. Equally necessary, we believe is the related admonition that the NALs are not touchstones or points of reference or in any way relevant to an assessment of whether a discharger's BMPs constitute BAT/BCT-level controls.

C. Monitoring Provisions Should be Modified for the Air Transportation Industry

1. Eliminate Monitoring and Analysis Requirements for the Air Transportation Industry

[29] Draft IGP, Section I(N)(66) at 11 and Fact Sheet at 48-50.
[30] Fact Sheet at 44.

We can express no opinion as to whether monitoring as required under the terms of the Draft IGP has some value with respect to certain industry sectors. As applied to the air transportation industry, however, such monitoring and its related requirements are not supported.

The Fact Sheet identifies the three purposes for monitoring under the Draft IGP. These are to indicate:

> a. Whether BMPs addressing pollutants in industrial storm water discharges and authorized non-storm water discharges (NSWDs) are in compliance with BAT/BCT,
>
> b. The presence of pollutants (and their sources) in industrial storm water discharges and authorized NSWDs that may require immediate ERAs, additional BMP implementation, or SWPPP revisions; and,
>
> c. The effectiveness of BMPs to prevent or reduce pollutants in industrial storm water discharges and authorized NSWDs.[31]

As demonstrated immediately above, monitoring against the NALs contained in the Draft IGP bears no rational relationship to a facility's compliance with BAT/BCT standards. Similarly, comparing monitoring data to the NALs sheds no light on whether additional BMP implementation or SWPPP revisions are necessary. Thus, neither the first nor the second of the stated purposes for the Draft IGP's monitoring provisions supports this activity. That leaves only the third justification for sampling: that it will provide information about the effectiveness of BMPs that the Board can use in future rulemakings to establish numeric technology-based effluent limitations.

While the need to collect data for use in future permit actions may provide an appropriate justification for the requirement to monitor most industries it does not provide such a justification for the air transportation industry. As described above, after more than a decade of study and rulemaking activity, EPA determined just this year that the air transportation industry is affected by numerous site-specific factors. These factors, while real and substantial in their impacts on individual facilities' ability to employ pollution control technologies, are not subject to quantification in a rulemaking. As a result, U.S. EPA declined to establish a uniform national technology-based standard for discharges related to aircraft deicing at existing airports. Instead, the Agency found that site-specific assessment was necessary to determine the levels of control that constituted BAT/BCT control of aircraft deicing fluid runoff in the air transportation industry.

What is true of airports nationally is equally true of airports within California. To the same extent that airports nationally cannot be lumped together under a single, uniform

[31] Fact Sheet at 33.

technology-based standard, neither can the smaller but still diverse collection of airports within the State. The factors that confound a nationwide standard, including "localized operational constraints (e.g., traffic patterns), land availability, safety considerations, and potential impacts to flight schedules," differentiate California airports to the same degree.

As a result, the aspiration to create a state-wide technology-based standard for aircraft deicing runoff at existing airports is not achievable. To the extent that this was the rationale for including monitoring requirements applicable to the air transportation industry in the Draft IGP, that rationale is demonstrably incorrect.

Put simply, the Board's authority to impose monitoring and reporting obligations derives from 33 U.S.C. Sections 1342 and 1318. Those sections authorize permit writers to require monitoring where the data is needed to assess compliance or to support new rulemakings. Here, sampling in order to compare collected data with the NALs is demonstrably unrelated to an assessment of compliance and, in the air transportation industry at least, is equally unavailing in supporting a new state-wide technology-based standard for discharges related to aircraft deicing at existing airports. Bereft of these justifications, there is no authority to impose monitoring obligations on the air transportation industry.

2. If Monitoring is Retained for the Air Transportation Industry, Reinstate Group Monitoring

We commented in 2011 in favor of continuation of the group monitoring program contained in the current program. We continue to believe that that program provides valuable efficiencies and cost savings for many industry sectors. A group monitoring provision is an important element of a general stormwater permit that addresses multiple industries and a significant number of complex, multi-party facilities.

Retention of a form of group monitoring is especially significant for the air transportation industry. Airports are facilities where multiple parties – the airport, multiple individual airlines, and possibly other dischargers – all may be permitted parties.[32] Moreover, BMPs at airports include runoff collection, segregation, retention and ponds and other wastewater management technologies whose effect can only be captured at final outfall points.

If monitoring is retained for the air transportation industry these parties would be standing in line to sample the same outfall following the same storm. While one of the Board's purposes in eliminating group monitoring was to obtain a larger data set with which to evaluate the performance of pollution control technologies, that benefit will not be realized at an airport. Instead, the State will receive essentially identical analytical data derived from samples taken at the same time and place. This redundancy will

[32] Oakland International Airport and airline maintenance facilities at other airports including San Francisco International Airport are examples of airlines holding general permits in California.

impose significant additional costs on the air transportation industry without realizing any of the benefits the Board hoped to secure by eliminating group monitoring.

We believe that, for the air transportation industry at least, the new permit should include some recognition that multiple sampling at the same location is both wasteful and fruitless. This could be accomplished by retaining the group monitoring provision for this one industry. It also could be accomplished, however, by providing for common monitoring only at facilities configured so that samples taken by multiple permittees will be taken at the same location and will characterize exactly the same collection of BMPs.

D. Prohibit the Use of Compliance Groups for the Air Transportation Industry

In the abstract, A4A applauds the option to form compliance groups that would be provided under the Draft IGP. Allowing similarly situated entities to band together to develop shared pollution control practices and technologies makes great sense in many circumstances. In the air transportation industry, however, that concept breaks down for a number of reasons.

First, as noted above, airports are as different from one another as are municipalities, with different infrastructure, different operations, different land availability, and different strategies to ensure the safe and timely dispatch of commercial aircraft. In this highly variable industry it is not appropriate to combine all facilities and attempt to force them into a one-size-fits-all solution. While certain elements (particularly consultants) may relish the economic opportunities this presents, as EPA discovered, it is not possible to impress uniformity on an industry sector that is so inherently diverse.

Moreover, airports operate under constraints that preclude them from diverting funds from airfield purposes to projects off the airfield. Projects off the airport entirely would clearly contravene these anti-diversion constraints.[33] Similarly, because they are public entities, airports often are funded not by private capital but by bond proceeds. As the Board is aware, bond proceeds often are tied to projects on the issuer's site in order to assure a connection between the bonds and the revenue stream supporting them. For these reasons, it is questionable whether airport could join together in a compliance group without violating their fiscal and financial commitments.

Finally, airports and airlines are partners in managing the runoff from airport facilities. Each has a role to play, with airlines developing pollution prevention technologies that reduce ADF usage and airports (with airline input) developing and operating the infrastructure that collects, conveys and manages deicing-related runoff from their sites. Because airline landing fees and lease payments in large measure fund airport operations, airlines have a keen economic interest in the solutions adopted. Airlines have an equal interest in the potential impacts on the efficiency of airport and airline operations.

[33] *See*, *e.g.*, 49 USC 47107 (b)(1), 47133 (FAA prohibition of revenue diversion for off airport property).

Creating a program where airports could form a compliance group in which airlines would not be represented (because, in most locations, only the airport is a permit holder) would disenfranchise half of the community that historically has taken responsibility for environmental advancement in aviation.

We appreciate the fact that the creation of a compliance group is a voluntary act. In light of these industry-specific factors, however, we believe that the air transport industry is ill suited to the formation and use of compliance groups. Therefore, we ask the Board to prohibit the use of compliance groups in our industry.

E. Non-Storm Water Discharges

Regional Boards within the State have misconstrued language in the current permit that prohibits the discharge of stormwater and non-stormwaters not expressly authorized to be discharged by the current permit. Identical language appears in the Draft IGP at Section III (B). Misuse of this subsection is of concern in the air transportation industry.

Section III (B) states:

> B. Except for non-stormwater discharges (NSWDs) authorized by Section IV, discharges of liquid or materials other than stormwater, either directly or indirectly to waters of the United Sates, are prohibited. These unauthorized NSWDs must be either eliminated or authorized by a separate NPDES permit.

Of concern are Regional Board interpretations of this language in the current permit holding that it is unlawful to discharge stormwater that entrains pollutants deposited during non-storm periods. For example, at least one Regional Board has concluded that the language requiring elimination of "discharges of liquid or materials other than stormwater" includes pollutants that are entrained by stormwater runoff but that, absent a storm event, would never become a discharge. Clearly, "stormwater associated with industrial activity" contemplates such entrainment in stormwater, and it is that stormwater combined with entrained pollutants whose discharge must be authorized by an NPDES permit. If stormwater runoff entrained no pollutants there would be no jurisdiction to regulate it under the Clean Water Act.[34]

This issue arises in the air transportation industry specifically in the context of dry weather deicing or "frost busting." Frost busting is the practice of using extremely small quantities of aircraft deicing fluid to clear wing surfaces and certain other critical aircraft components of the light frost that results when atmospheric moisture condenses on aircraft surfaces that remain cold following high-altitude flight. This practice, which is critical for flight safety, uses small quantities of aircraft deicing fluid and none of that

[34] The Act regulates only "discharges," and a discharge is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). If no pollutant is added to the receiving waters, there is no regulable discharge.

fluid is allowed to reach facility drains. Where drains are present immediately under aircraft to be defrosted those drains are covered during the procedure so that any excess fluid can be collected before it can flow into any facility drain system. As a result of the low volumes of fluid used and this so-called "cover and sweep" BMP, frost busting produces no discharge during dry weather to the drains or to the receiving waters.

Under wet weather conditions, of course, stormwater can entrain any residual frost busting material left on the apron and convey it to the outfall as it conveys all other pollutants that occur in stormwater associated with industrial activity.

We ask that the Board clarify for its Regional Boards that the language in Section III (B) of the Draft IGP prohibits active discharges of pollutants during dry weather, but that it does not prohibit discharges during stormwater runoff of pollutants that have come to reside on outdoor surfaces during dry weather.

It is perfectly appropriate to require that dischargers employ BAT/BCT levels of control to manage and minimize the presence of such residues in order to reduce the potential for entrainment when a precipitation event occurs. What is not permissible is to prohibit, absolutely and in any amount, the wet weather transport of such pollutants. A4A greatly appreciates the Board's clarification of this distinction going forward.

F. Replace Reference to Proposed ELG for Airport Deicing Discharges With Reference to Final, Promulgated ELG

The reference in Attachment E to existing effluent guidelines limitations that address stormwater discharges should be updated. Currently, that attachment contains a link and reference to the Federal Register notice announcing the proposed Airport Deicing ELG. Because the final rule was promulgated this past spring, that reference should be changed to identify the final rule. The citation for that final rule is 77 Fed. Reg. at 29168 (May 16, 2012); codified at 40 C.F.R. Parts 9 and 449 (2012).

G. Clarify Training Qualifications for Qualified Industrial Storm Water Practitioner (QISP) Level I, II and III to Include a "Train the Trainer" Program

It is requested that due to the number of people that will need to be trained due to the increased sampling, that more description on the training program be provided prior to the permit going into effect and provide clarification on which level of QISP is authorized to train sample collectors.

H. Review and Correct or Explain NOI Deadlines

Draft IGP Section D.1at page 17, lines 5 and 6 states that "Existing dischargers that have not submitted NOIs for the previous permit shall have until July 1, 2014 to register for NOI or NEC coverage." We believe that this may simply be a typographical error. If it is not, clarification is required of why most dischargers must register for NOI or NEC

coverage by July 1, 2013, but dischargers who have not sought coverage under the existing permit get an extra year to obtain coverage under the new IGP.

Conclusion

We appreciate the challenges inherent in developing a general stormwater permit for a disparate host of industries. Through its multiple iterations, the Draft IGP has moved closer to a form that will be workable and legally supportable.

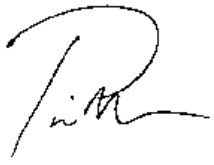
There are still unmet issues, however. For the reasons stated above, A4A requests that the Board and its staff re-examine the Draft IGP with the unique features of the air transportation industry in mind. We believe that these features in some cases mandate, and in others, argue persuasively for modifications of the Draft IGP as it is applied to airports and airlines. Especially where conditions of the Draft IGP are justified by the need to provide information that will facilitate development future industry-wide numeric standards, (e.g., monitoring and some QISP requirements), the Board should reconsider the justification for those provisions in connection with the air transportation industry, which EPA has recently found unsuited to inflexible, standardized numeric limitations.

A4A also requests that the Board re-evaluate its reliance on NALs. Not only do these so-called "action levels" effectively function as effluent limitations, but they trigger review of facility BMPs when pollutant levels wholly unrelated to BAT/BCT-level controls are exceeded. The lack of a reasonable relationship between the trigger and the review makes these particular NALs inappropriate.

Moreover, by shifting both the burden of standard setting and the risk of setting the wrong standard to permit holders, the Draft IGP stands the Clean Water Act's on its head, relieving the State of its statutory duty to develop effluent limitations consistent with the Act's standards and depriving dischargers and the public of the well-defined process and protections afforded by the permit appeal process.

A4A stands ready to work with the Board and its staff to address these and other challenges identified in these comments. With our experience working with federal and state permit writers on airport permits nationwide, we have a wealth of knowledge as to permit terms that work in the aviation context and those that cannot. We welcome the opportunity to share that learning with staff and to help to the Board refine the Draft IGP into a general permit that deals appropriately with this important Thank you for your consideration.

Sincerely yours,



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